

Henri Danvin
v Commission of the European Communities

Case 26/67

Summary

1. *Officials — Rules relating to acting as deputy for another official — Powers of the administration — Rules relating to temporary posting — Application of those rules reserved for officials in the same category as those to be replaced*
(*Staff Regulations of Officials of the EEC, Article 7*)
2. *Costs — Order for each party to bear own costs — Exceptional circumstances*
(*Rules of Procedure, Article 69(3)*)

1. The system for the temporary replacement of absent officers forms part of the general powers of any administration in respect of the organization of its departments, which it may use for the purpose of ensuring the continuity of the service when the holder of a post is absent or prevented from attending to his duties. Such replacement may only continue for as long as is required for the normal functioning of the department, having regard to the objective needs of that

department. Since temporary posting is only permissible within the category of the official to be replaced, it cannot be applied to a person replacing an official in a category other than his own.

2. Exceptional circumstances justifying an order that the parties bear their own costs in whole or in part exist where the silence of a legal provision as to the position in law of the applicant was such as to create doubts regarding the rules of law applicable.

In Case 26/67

HENRI DANVIN, an official of the Commission of the European Communities, represented and assisted by Marcel Slusny, Advocate at the Cour d'Appel, Brussels, lecturer at the Free University of Brussels, with an address for service in Luxembourg at the Chambers of E. Arendt, Advocate, 6 rue Willy-Goergen,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser,

¹ — Language of the Case: French.

L. de la Fontaine, with an address for service in Luxembourg at the offices of H. Manzanarès, Secretary of the Legal Department of the said Commission,

defendant,

Application for the annulment of an implied decision refusing a request made by H. Danvin on 12 January 1966 for a differential allowance and for the payment of compensation,

THE COURT (Second Chamber)

composed of: W. Strauß, President, A. Trabucchi (Rapporteur) and P. Pescatore, Judges,

Advocate-General: J. Gand

Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts

The facts may be summarized as follows: The applicant holds a post in Category B1 in the Accounts Division of the Directorate for Investments of the Directorate-General for Overseas Development. By decision of the President of the Commission of 5 June 1959, Mr Danvin was appointed assistant accounting officer in an accounting unit the head of which was Mr Heusghem, an official in Grade A5. Another decision of the same date specified that when the chief accounting officer was absent or prevented from attending to his duties, the assistant accounting officer should take over his duties. These two decisions were adopted on the basis of Articles 6 and 9 of Provisional Regulation No 6 of the Council of 3 December 1958 (Official Journal No 33 of 31 December 1958) relating to the responsibility of authorizing officers and accounting officers for the funds of the Development Fund for the Overseas Countries and Territories.

On the entry into force of the Convention of Association between the EEC and the Associated African States and Malagasy, the Commission undertook the restructuring of the accounting services in compliance with the provisions of the Financial Regulation adopted by the Council on 1 June 1964 (Official Journal No 93 of 11 June 1964) providing for the setting up of an independent service under a financial comptroller.

Under the temporary measures adopted for the purpose of implementing the financial operations relating to the second European Development Fund, Mr Heusghem was, on 25 February 1965, nominated as the official in charge of controlling the accounts. From then until June 1966, Mr Danvin carried out the duties of chief accounting officer, as a replacement, first, for Mr Heusghem and, as from 20 December 1965, for Mr Bering, the new Holder of the post of chief accounting officer for the Fund.

On 12 January 1966, Mr Danvin requested the differential allowance prescribed by

Article 7(2) of the Staff Regulations for the period during which he had replaced the chief accounting officer. This request, which had received the support of the applicant's Director-General, was refused by the Directorate-General of Administration, on the ground that under the provisions of Article 7(2) of the Staff Regulations temporary posting applies only within a category or service.

Contesting the decision rejecting his request, which was notified to him by letter of 27 February 1967 from the Director-General of Administration, on 30 March 1967 Mr Danvin submitted a complaint under Article 90 of the Staff Regulations to the President of the Commission claiming damages equivalent to the differential allowance under Article 7(2) of the Staff Regulations for the period during which he had replaced the principal accounting officer.

On 24 July 1967, Mr Danvin made an application to the Court against the implied decision rejecting his request constituted by the silence of the Commission. He named both the European Economic Community and the Commission of the European Communities as parties.

II — Conclusions of the parties

The *applicant* claims that the Court should:

- '1. Annul the implied decision of the Commission of the European Economic Community rejecting his appeal through official channels;
2. Rule that the applicant must be paid a differential allowance calculated on the basis of the principles set out in Article 7(2) of the Staff Regulations and which the applicant estimates, subject to the right to amend the sum as he may deem necessary during the course of the proceedings, at BF 100 000;
3. Order the defendants to pay this allowance;
4. Order the defendants to bear all the costs of the proceedings;
5. Order the defendants to submit to the Court the calculation of the allowance which should have been paid to the applicant in accordance with Article 7(2) of the Staff Regulations'.

The *defendant* contends that the Court should:

- dismiss the application as unfounded;
- order the applicant to bear the costs in accordance with the provisions applicable'.

III — Submissions and arguments of the parties

A — *The admissibility of the application*

The admissibility of the application is not contested by the defendant.

B — *The substance of the case*

The submissions and arguments of the parties may be summarized as follows:

1. The submission relating to infringement of the Staff Regulations of Officials and to the wrongful act or omission constituted by this infringement

The *applicant* maintains that apart from the question whether the temporary posting with which he had been entrusted conformed to the Staff Regulations he could not refuse to follow the instructions issued by his immediate superiors. If these instructions proved to be contrary to the Staff Regulations, the Commission would be guilty of a wrongful act or omission giving rise to liability on its part.

The *defendant* contends that no temporary posting was conferred on Mr Danvin; it was only the decision of the President of the Commission of the EEC of 5 June 1959, providing expressly that the assistant accounting officer should automatically deputize for the chief accounting officer when the latter was absent or prevented from attending to his duties, which was applied. Consequently, there was no infringement of the Staff Regulations or of any other rules of law on the part of the applicant's superiors. The *applicant*, in his reply, emphasizes that the two decisions of the President of the Commission, adopted in pursuance of Articles 6 and 9 of Provisional Regulation No 6 of the Council of 3 December 1958 were prior to the entry into force of the Staff Regulations of Officials in 1962. The

relationship between Mr Danvin and the Commission for the period in which he replaced his chief accounting officer were therefore governed by the Staff Regulations. This is confirmed by the fact that Article 9 of the abovementioned Regulation No 6 of the Council refers to the provisions which should subsequently have been taken pursuant to Article 209(c) and the third paragraph of Article 215 of the Treaty. The temporary provisions which were adopted in this connexion by the President of the Commission before the provisions referred to in Article 9 of Regulation No 6 were adopted must therefore be regarded as having been repealed by implication by the Staff Regulations.

The *defendant* denies that there is any link between the decisions of the President relating to the organization of the Accounts Department and Article 9 of Provisional Regulation No 6 of the Council. Accordingly, the argument which the applicant bases on Article 9 cannot support his proposition that the organization of the Accounts Department, established by the two decisions of the President, was only a temporary measure.

The applicant's principal argument relating to tacit revocation of the two decisions of 1959 is based on a misinterpretation by him of the two concepts of temporary posting and of deputizing. Whilst it admits that in practice these two concepts relate, more or less, to the same function, the defendant points out that there are important differences between them: deputizing, in contrast to temporary posting, is of an automatic and precautionary nature, and limits the deputy's powers in such a way that he cannot alter the general orientation given to the activities of the department by the official holding the post.

Having regard to these differences, the defendant maintains that Article 7 of the Staff Regulations, corresponding exclusively to the concept of temporary posting, cannot exclude other forms, prescribed by legislative provisions from time to time, of replacing the holder of a post who is absent or prevented from attending to his duties.

In the *applicant's* opinion, the strict interpretation of the word 'category', referred to in Article 7(2), in the sense that an official in

Category B cannot be temporarily assigned to a post in Category A, is in this case contrary to the spirit of the provision in question. However, even from the point of view of this strict interpretation, the applicant's position presented anomalies: he was not allowed under the Staff Regulations to deputize for his chief and yet he did so for four months longer than the period of one year prescribed for the temporary posting of officials of the same category.

The *defendant* states, on the other hand, that in Article 7(2) of the Staff Regulations the word 'category' is not used in a sense different from that in Article 5.

The fact that the period for which the principal accounting officer was prevented from attending to his duties continued for so long is explained by the complexity of the problems raised by the restructuring of the accounting departments and by the unforeseeable nature of the circumstances which delayed the appointment of the new chief accounting officer. Mr Danvin's period of disputizing for his chief was justified in the interests of the service and could not therefore give rise to damages.

In the absence of any provision expressly authorizing it, the Commission was not obliged to grant Mr Danvin a special allowance compensating him for the work which he carried out and which, essentially, is covered by the duties attaching to his post. In any case, the action for damages brought by the applicant is completely unfounded since he has not proved that he suffered any damage.

The *applicant* observes that, according to Article 2 of the decision of the President of the Commission of 5 June 1959 relating to the replacement of the chief accounting officer by his deputy, the President was required to authorize every such replacement. The replacement of Mr Heusghem by Mr Danvin was not automatic; at the time it was not possible for the appointment to be made by decision of the President of the Commission but it was decided upon by the Director-General for Overseas Development, in other words by his superior officer, as is implied by Article 7(2) of the Staff Regulations.

The defendant points out in reply that the intervention by the Director-General re-

sponsible for the applicant did not amount to a formal assignment of the post but merely constituted a designation of a person who, once chosen, was automatically entrusted with the duties on the strength of the President's decision. Moreover, the applicant's immediate superior did not have the power to authorize the temporary posting under Article 7(2) of the Staff Regulations, since the application of this Article is solely a matter for the appointing authority. The defendant also contests the applicant's argument that the wording of the President's decision prescribes that the authorization of the President is required on every occasion on which a deputy assumes the duties of his superior. On the contrary, this decision entrusts the deputy with the duties of his superior once and for all, so that the system functions automatically whenever the need arises.

2. The submissions relating to unjust enrichment

The *applicant* maintains that the Commission has been unjustly enriched and by reason of this fact has a duty to pay to him a differential allowance calculated in accordance with the principles set out in Article 7(2) of the Staff Regulations of Officials.

The *defendant* objects that, according to the internal laws of the six Member States, unjust enrichment and corresponding loss must not result from any legal relationship between the parties. In this case, on the other hand, the alleged enrichment derives from the relationship of employment between Mr Danvin and the Commission and this suffices to deny him the opportunity to plead *actio de in rem verso*. Since the Commission cannot be held in anyway to be liable, the enrichment is merely the result of the service which the applicant is legally bound to perform.

In his reply, the *applicant*, after emphasizing that he only intended to raise this submission as a subsidiary plea, asserts that the work and additional responsibilities which he assumed have without doubt led to a gain on the part of the institution since it has obtained at one and the same time the work of a chief accounting officer and that of an assistant account officer for the salary of the

latter. The damage which the applicant has suffered arises from the fact that in carrying out his superior's work in addition to his own he exhausted the possibility of undertaking any occasional additional work outside his duties with the Commission.

If there is no legal provision justifying this enrichment on the part of the institution, it must be recognized that it is unjustified.

Even if the first submission is rejected this submission is justified for reasons of natural justice.

The *defendant* maintains that the subsidiary nature attributed to the *actio de in rem verso* must be judged *in abstracto* by reason of the exceptional nature of that action; this means that the plaintiff can only bring such an action if he has no other grounds of action arising from a contract or quasi-contract or based on tortious or quasi-tortious liability, which is not the case here, for the facts giving rise to the alleged enrichment occurred within the context of a relationship governed by public law between the applicant and the Commission.

In any case, the defendant maintains that the submission based on unjust enrichment cannot be accepted, since it has not been established that the applicant suffered damage.

Gainful activity outside the service is of an exceptional nature under the Staff Regulations, as can be seen from the fact that for such activity to be legal it must be authorized in accordance with the provisions of Articles 11 and 12 of the Staff Regulations. Finally, the defendant states that the action arising from unjust enrichment is not based on considerations of natural justice but on specific legal principles established either by the legislature or by case-law.

3. The amount of the allowance

Subject to the right to amend the sum as he may deem necessary during the course of the proceedings, the *applicant* claims an allowance of BF 100 000.

The *defendant* points out that the actual amounts of the allowance to which Mr Danvin would be entitled, if Article 7(2) of the Staff Regulations were to apply in his case, would be, at the most, BF 16 783.

The *applicant* replies that to the material,

damage which he suffered there must be added the non-material damage caused by the false hope which he was given of occupying officially the post the duties and responsibilities of which he was undertaking on a provisional basis.

The *defendant* observes in its rejoinder that, by persisting in his claim for an allowance of BF 100 000 without at the same time contesting the fact that the allowance calculated on the basis of Article 7(2) of the Staff Regulations amounts to BF 16 783, the applicant has thereby advanced a new claim. In effect, this claim, which the applicant now justifies by reference to the existence of alleged non-material damage, is no longer directed towards obtaining solely the differential allowance under Article 7(2) of the Staff Regulations, which the applicant has requested in his appeal through official channels and in his application to the Court.

This new claim must be dismissed on the ground of inadmissibility. Furthermore, there can be no 'false hopes' for which the official concerned can receive compensation

since he could not have been ignorant of the fact that a temporary appointment can never give a person the right to promotion. During the oral procedure the applicant stated that the calculation of the allowance made by the defendant on the basis of Article 7(2) was incorrect, since account was not taken of the applicant's seniority in his grade. At the same time counsel for the applicant declared that he withdrew the claim relating to compensation for non-material damage.

IV — Procedure

The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General the Court (Second Chamber) decided to open the oral procedure without making any preparatory inquiry.

The oral procedure took place on 15 May 1968 and the Advocate-General delivered his opinion at the hearing on 27 May 1968.

Grounds of judgment

The applicant maintains that his relationship with the Commission during the period for which he replaced his chief accounting officer was governed exclusively by the Staff Regulations of Officials, since those Regulations revoked by implication the temporary measures adopted on 5 June 1959 by the President of the Commission providing that, within the European Development Fund, the assistant accounting officer should automatically deputize for the chief accounting officer.

That decision of the President of the Commission, the purpose of which was to ensure continuity in the exercise of the duties of chief accounting officer of the European Development Fund, established rules intended to provide that when the chief accounting officer was absent or prevented from attending to his duties he should be automatically replaced on a temporary basis, by the assistant accounting officer.

This special measure, which concerns a particular sphere, cannot reasonably be replaced by the general provisions of the Staff Regulations of Officials.

The functioning and organization of the European Development Fund require that there should be no interruption in the exercise of the duties of chief accounting

officer. It is therefore necessary that the official called upon to deputize for the chief accounting officer should be designated in advance so as to facilitate the latter's immediate replacement by a suitably qualified servant.

Under the Staff Regulations, the only provision for ensuring the temporary replacement of one Community official by another is the procedure of temporary posting governed by Article 7(2). Under this provision, however, an official can only be called upon to occupy temporarily a post which is in the same category as the post which he occupies permanently. The post of assistant accounting officer may fall in a category lower than that relating to the post of accounting officer. In such a case, the Staff Regulations do not make provision for temporary replacement of the chief accounting officer, when he is absent or prevented from attending to his duties, by the official who, within the organization of the European Development Fund, may be considered, in his position as assistant, as the most suitable for this task.

In these circumstances, and in the absence of any express prohibition in the Staff Regulations in this connexion, the functioning of the Accounts Department of the European Development Fund requires and justifies the continuance, even after the entry into force of the Staff Regulations, of the special provision instituted by the President of the Commission for the temporary replacement of the chief accounting officer.

The reference made by Article 9 of Provisional Regulation No 6 of the Council of 3 December 1958 to the provisions which were subsequently to be adopted pursuant to Article 209(c) and the third paragraph of Article 215 of the EEC Treaty only relates to the rules concerning the responsibility of authorizing officers and accounting officers of the Fund in respect of the regularity of payments and the keeping of accounts.

Consequently, this reference cannot mean that the special provision relating to the replacement of the chief accounting officer by the assistant accounting officer is automatically revoked by the Staff Regulations of Officials.

Furthermore, the system for the temporary replacement of absent officers forms part of the general powers of any administration in respect of the organization of its departments. These powers may be used for the purpose of ensuring the continuity of the service when the holder of a post is absent or prevented from attending to his duties.

Such replacement may only continue for as long as is required for the normal functioning of the department, having regard to the objective needs of that department. The applicant replaced the chief accounting officer for sixteen months. Although this extraordinarily long period of time may be justified in this case by the position and special requirements relating to the restructuring of the European

Development Fund, it is nevertheless desirable that as a general rule in such cases the administration should, in so far as is possible, replace an official prevented from attending to his duties for a protracted period by an official who can benefit from the temporary posting.

It is regrettable that the applicant, who for a long period carried out duties in a grade higher than his own and who, according even to the Commission, acquitted himself very creditably with the more complex tasks thus entrusted to him, was unable to enjoy the benefits provided for by Article 7(2) of the Staff Regulations. However, having regard to the legal provisions in force, which only permit temporary posting within the same category, it is not possible to apply the provisions of Article 7(2) to the applicant, who replaced an official in a category different from his own.

It follows from the foregoing considerations that the defendant has not committed the wrongful act or omission alleged by the applicant.

The applicant claims to be entitled to an allowance by reason of the Commission's enrichment resulting from the activity which he performed as replacement for the chief accounting officer.

It follows from the foregoing considerations that the fact that the defendant temporarily conferred upon the applicant, acting as deputy, duties relating to a grade higher than his own does not provide grounds for complaint.

In these circumstances and without prejudice to the question of the applicability to the relationship between the Community administration and its officials of the concept of unjust enrichment, it cannot, in any case, be accepted that the Commission was unjustly enriched by reason of the applicant's activities. Moreover, according to a generally accepted principle in the national legal systems, the applicant's action would only be well founded if he had suffered loss corresponding to the alleged enrichment of the other party. In this case, the applicant has not proved his claim to have suffered prejudice by reason of his performing duties of a grade higher than those relating to his own post under the Staff Regulations.

Accordingly, the submission of unjust enrichment must be rejected.

Costs

The applicant has failed on all the heads of his application. Under the combined provisions of Articles 69(2) and 70 of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs with the exception, for Community officials, of the costs incurred by the defendant institution.

It is, however, appropriate in this case to apply Article 69(3) of the Rules of

Procedure, under the provisions of which the Court may order that the parties bear their own costs in whole or in part where the circumstances are exceptional. It must in fact be admitted that the silence of the Staff Regulations as to the legal position of a deputy was such as to create uncertainty regarding the rules of law applicable.

Furthermore, taking into consideration the facts in this case, it would be particularly unjust to order the applicant to bear all his own costs.

On those grounds,

Upon reading the pleadings;

Upon hearing the report of the Judge-Rapporteur;

Upon hearing the parties;

Upon hearing the opinion of the Advocate-General;

Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;

Having regard to the Staff Regulations of Officials of the European Communities, especially Article 7;

Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (Second Chamber)

hereby:

1. Dismisses Application 26/67 as being unfounded;
2. Orders the defendant to bear its own costs and three-quarters of the applicant's costs.

Strauß

Trabucchi

Pescatore

Delivered in open court in Luxembourg on 11 July 1968.

A. Van Houtte

W. Strauß

Registrar

President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL GAND
DELIVERED ON 27 MAY 1968¹

*Mr President,
Members of the Court,*

Before examining the merits of the application made by Mr Danvin—an official of

whom the defendant institution speaks highly, but whose request it declares itself unable to satisfy—I should like to recall briefly how the dispute arose.

For the creation in 1958 of the Development

¹ — Translated from the French.